APPENDIX "A"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Richard D. Zelechower, M.D., et al., Plaintiffs-Appellants, vs. Evelle J. Younger, etc., et al., Defendants-Appellees.	)))))	No. 23331

[February 27, 1970]

ORDER MODIFYING OPINION

Before: BARNES, KOELSCH and KILKENNY, Circuit Judges.

The opinion of January 28, 1970 in the above matter is modified by striking from the ninth paragraph thereof (beginning with the words "Peter and June Bogart") the following:

> "Evelle J. Younger, individually and as District Attorney of the County of Los Angeles"

and

> "Thomas C. Lynch, individually and as Attorney General of the State of California":

so that said ninth paragraph of said opinion shall read:

> "Peter and June Bogart appear in pro per. As to their claims against defendants the Board of Supervisors of the County of Los Angeles; the Superior Court of the State of California for the County of Los Angeles, et al.; 'The People of the

State of California, by Ronald Reagan, Governor of the State of California,' we hold them improperly joined as defendants, and immune from suit."

KOELSCH, Circuit Judge, CONCURRING SPECIALLY.

I do not share the court's view that the Zelechowers' pleading tenders no substantial federal question. As noted in the opinion, the attack centers upon Section 897 of the California Penal Code and a Local Rule (Rule 29) promulgated by the Superior Court of Los Angeles County, California. Both the statute and the rule regulate the selection of persons for grand jury service. The statute operates to exclude from eligibility persons "who are not exempt from serving . . . ." Further statutes (Cal. P.C. 894 and CCP 200) specifically designate the persons so exempted. So far as pertinent to this case they are:

> "(1) A judicial, civil, naval or military officer of the United States or of this State, or a member of the Armed Forces of the United States while on active duty;
> * * * "
>
> (3) An attorney at law, or the clerk, secretary, or stenographer of an attorney at law;
> * * *

Local Rule 29 (although ambiguous) contains a broader exclusion than the statute and makes ineligible for grand jury service "(b) Spouses of judges and

Commissioners of the Superior Court and the Municipal Court and attorneys known to be in active practice . . . ".

The Zelechowers' theory, urged in their complaint, is that the quoted provisions appearing in both the statute and the rule contravene the Fourteenth Amendment to the Federal Constitution because the classifications are arbitrary. This court, on the supposed authority of *Rawlins v. Georgia*, 201 U.S. 638 (1906) and *Hoyt v. Florida*, 368 U.S. 57 (1961), holds these classifications reasonable and declares both statute and rule constitutionally valid.

I am not so sanguine. The *State statute* is probably not vulnerable to the attack for, as pointed out in *Rawlins*, an exclusion is valid if the work of the class is of such public importance that it should not be interrupted. The enumeration in the statute is of persons so engaged.

But I entertain grave doubts about the validity of the local rule. It creates and excludes a class consisting of "spouses" of those whose work warrants their being set apart and treated differently than others. However, it does not follow that because of their marital status the husbands and wives thus singled out are all engaged in some common activity or indeed any activity, much less one that would permit a like differentiation to be made of them.

Thus, unlike my brothers Barnes and Kilkenny, I would not so readily place a judicial imprimatur upon

the local rule; neither would I reach the question of its validity. The Supreme Court has repeatedly declared that ordinarily it ought not to pass upon the constitutionality of a statute or rule unless adjudication is unavoidable and that the same principle should guide the lower courts as well. We should heed that admonition in this case.

I nevertheless concur in the result reached in the opinion. As there stated, injunctive relief should be withheld on principles of abstention. Declaratory relief can and should be denied on the same basis; and the action for damages against all defendants is nullified by the doctrine of immunity. The opinion holds that several of the defendants are so protected, but expresses no opinion as to the defendants Younger and Lynch. The latter are, respectively, the District Attorney for Los Angeles County, California, and the Attorney General of that State. The complaint does not show, and indeed could not be amended to show, their conduct on which the claims are purportedly based was not in the performance of their official duties.

I would affirm on that ground.